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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 712.

IN THE MATTER
of
ST. CHARLES HOTEL COMPANY,
Alleged Bankrupt.

HARRY CASSMAN, As Receiver of St. Charles Hotel Company, appointed by the Chancery Court of the State of New Jersey,

Petitioner,

against

ABRAHAM KURZROCK, KATIE BOSSHARD, and MURIEL J. BRYER, as Petitioning Creditors of an involuntary petition in bankruptcy filed against St. Charles Hotel Company,

Respondents.

MEMORANDUM OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported at 157 F. 2d 317.

Statement.

The facts briefly summarized are as follows:

A bill of complaint was filed in the New Jersey Court of Chancery praying for the appointment of a statutory receiver on the ground of insolvency.

Before the hearing on the order to show cause, the defendant corporation filed a voluntary petition under Chapter X in the United States District Court for the District of New Jersey and the District Judge appointed a temporary trustee as custodian.

The state court complainant answered and attacked the jurisdiction of the Reorganization Court on the ground that the Chapter X good faith prerequisites were lacking.

On March 26, 1945, the District Judge determined that the Reorganization Court had no jurisdiction to entertain the debtor's Chapter X petition and ordered that the petition be dismissed.

The next day, a bondholder applied for leave to intervene for the purpose of having the order of dismissal vacated and the matter was set down for hearing.

On April 4, 1945, the State Court, *with the consent of the bankrupt*, appointed a statutory receiver.

On April 30, 1945 the District Judge denied the application to vacate the order of dismissal and the bondholder appealed.

On June 13, 1945 the Circuit Court of Appeals for the Third Circuit affirmed all of the Reorganization Court's orders.

A petition for a writ of certiorari was thereafter filed in this Court.

On July 2, 1945, before the petition for writ of certiorari was filed, these petitioning creditors, in the bankruptcy suit at bar, appeared before the District Judge, who had dismissed the Reorganization suit. They advised him that the Circuit Court had affirmed the orders dismissing the Chapter X proceeding and requested leave to file the involuntary petition in bankruptcy on the ground that the appointment of the State Court receiver on April 4, 1945 constituted an act of bankruptcy, and, that the involuntary petition had to be filed within four months from the date of appointment of the State Court receiver (20a).

The District Judge granted leave to file the involuntary petition but stated that no bankruptcy receiver could be appointed or adjudication entered until the mandate was received from the Circuit Court (21a).

On July 17, 1945 the State Court Receiver applied to the District Judge for leave to intervene and file an answer to the involuntary petition in bankruptcy. The Judge suspended the hearing of the application until the determination by this Court of the application for a writ of certiorari.

On October 15, 1945, this Court denied the application for a writ of certiorari.

On October 27, 1945, the application of the State Court Receiver to intervene was brought on for hearing. The District Judge entered two orders, (1) denying the intervention of the Receiver, and (2) adjudging the St. Charles Hotel Company a bankrupt (22a).

ARGUMENT.

I.

The opinion of the Court below cites and follows the opinion of this Court in *Duggan* v. *Sansberry*.

The Circuit Court held that after the entry of an order in a Chapter X reorganization court dismissing a voluntary petition for lack of jurisdiction, a bankruptcy court could permit an involuntary petition in bankruptcy to be filed. It cited and followed the opinion of this Court in *Duggan* v. *Sansberry,* decided March 4, 1946, 326 U. S. ; 66 S. Ct. 657; (See 175 F. 2d 319, 320, footnote 7).

It is significant that the Receiver fails to refer to *Duggan* v. *Sansberry* in his brief.

In *Duggan* v. *Sansberry,* this Court reviewed the Reorganization Court's jurisdiction and injunctive power, prior to the entry of a "final order" of approval (Sec. 149, 11 U. S. C. A. Sec. 549), and held that in the absence of a stay order by the Reorganization Court, a Bankruptcy Court, or other Forum could proceed to administer the assets of the debtor in its possession.

In the case at bar, no final order was ever entered by the Reorganization Court approving the Chapter X petition pursuant to Section 149, 11 U. S. C. A. Sec. 549.

On the contrary, the Reorganization Court, on a direct attack, dismissed the reorganization petition for lack of jurisdiction.

Therefore, under the applicable Chapter X provisions, there was no bar against the filing of a subsequent bankruptcy petition as there was likewise no bar against the appointment of the State Court Receiver, both of which events occurred after the dismissal of the Chapter X petition by the District Judge.

The construction placed upon Sec. 149 by this Court in *Duggan* v. *Sansberry*, supports the filing of the involuntary petition in bankruptcy on July 2, 1945, as at which date:

(a) The Chapter X petition had been dismissed by the District Court for lack of jurisdiction on a direct and not a collateral attack, and the dismissal had been affirmed by the Circuit Court.

(b) There was no stay order against the institution of any suit and there has been none since that date. On the contrary, the District Judge permitted the filing of the involuntary bankruptcy petition.

(c) The appellate processes were respected by allowing the involuntary bankruptcy petition to lie dormant until the denial of the writ of certiorari by this Court (25a).

II.

The Court below cited and followed the opinion of this Court in *Huron Holding Corp.* v. *Lincoln M. Operating Co.*

The Court below points out that there was no "clash of jurisdiction" between a Reorganization Court and a Bankruptcy Court, since the Reorganization Court had dis-

missed the petition before it, thereby relinquishing its jurisdiction. Further, that

> "The decision was final and that finality was not disturbed merely by the taking of an appeal." (See 157 F. 2d. 317, 320.)

In support of this holding, the Court below cited *Huron Holding Corp.* v. *Lincoln M. Operating Co.*, 312 U. S. 183, 189, in which this Court stated:

> "To the same effect, in the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality."

III.

No conflict exists between the decision below and the opinion in the tenth circuit.

The Receiver asserts a supposed conflict in rationale in the opinion of the Third Circuit Court of Appeals and in the opinion of the Tenth Circuit in *Humphrey* v. *Bankers Mtge. Co.*, 79 F. 2d 345. There is no conflict. The *Humphrey* case stands only for the proposition that if a Reorganization Court enters an order approving a 77B petition, it cannot enter a subsequent order approving of another 77B petition.

We agree with the conclusion of the Tenth Circuit. In that case, an involuntary 77B petition was filed by creditors which was contested by the debtor corporation and others. The Judge, in charge of that proceeding, signed an order

approving the petition and assuming jurisdiction. On the same day, about two hours later, the debtor corporation filed with the other Judge sitting in the same district, a voluntary 77B petition and the second Judge likewise entered an order approving the voluntary petition, and assuming jurisdiction. Each Judge thereupon appointed different trustees.

The Circuit Court of Appeals pointed out that

> "By that action (the order of approval) jurisdiction attached to the debtor and its property was in *custodia legis. It was exhaustive and exclusive of subsequent action identical in nature.* It could not be exercised by repetition." (p. 352).

It will be noted however that the Circuit Court does not declare that the filing of a subsequent petition is void, *ab initio.* On the contrary, the *filing* of both petitions is upheld since the Circuit Court's decree to the Court below contained a

> "direction to consolidate the voluntary proceeding with the involuntary and that all subsequent action be had in the latter" (p. 352, last Par.).

The basic fallacy in the argument of the receiver lies in his failure to recognize that a bankruptcy suit and a Chapter X proceeding are two entirely distinct, separate and independent proceedings.

In *Fidelity Assurance Association* v. *Sims,* 318 U. S. 608, this Court held that a bankruptcy suit was entirely separate, distinct and independent from a Chapter X suit.

This conclusion is supported by the provision that "if a proceeding under this Chapter shall be dismissed, the filing of the petition shall not constitute an Act of Bankruptcy by the debtor (Section 262, 11 U. S. C. A. 562)."

IV.

The Receiver's proposed defense that the prior Chapter X proceeding was pending and that the bankruptcy suit should therefore abate became moot and untenable after October 15, 1945, on which date this Court denied the application for a writ of certiorari to review the dismissal of the Chapter X petition.

The involuntary petition in bankruptcy was filed after the affirmance by the Circuit Court of Appeals of the dismissal of the Chapter X proceeding and before a petition for a writ of certiorari was filed in this Court.

On October 15, 1945, when this Court denied the application for a writ of certiorari, no plea of abatement had been filed in the bankruptcy suit.

On October 27, 1945 the receiver appeared in the District Court and argued his application for leave to intervene and for leave to file the proposed plea in abatement. The proposed plea of abatement had, however, become moot and academic on October 15, 1946.

The editors of American Law Reports state (118 A. L. R. 1477):

> (p. 1477)
>
> "By the weight of authority it is held that a plea in abatement setting up the pendency of a prior suit

> is not good, although the prior suit was pending when the second action was commenced, where the prior suit was dismissed, or otherwise terminated, before the plea in abatement was filed."
>
> (p. 1480)
>
> "The rule, however, is now well established in most jurisdictions that termination of the prior action even after the filing of the plea in abatement may be sufficient to defeat such plea based on the pendency of a prior action between the same parties and for the same cause."

The same views are drawn from a review of the authorities by the editors of *Corpus Juris Secundum,* (1 C. J. S. Sec. 71, pp. 110, 111).

Conclusion.

We submit that the opinion of the Circuit Court of Appeals for the Third Circuit is in conformity with the opinions of this Court and is not in conflict with the opinion of any other circuit. The writ of certiorari should be denied.

Respectfully submitted,

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SAMUEL M. HOLLANDER,
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